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In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 622

DAVID H. MITCHELL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 122-129)[1] is reported at 208 F. 2d 854.

JURISDICTION

The judgment of the Court of Appeals was entered January 6, 1954 (R. 129-130), and a petition

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[1] References to the printed record will be designated, "R". References to the reporter's transcript of the evidence, which has been certified to this Court, will be designated "Tr.", and the page numbers used will be the red numbers at the top of each page.

for rehearing was denied February 8, 1954 (R. 143). The petition for a writ of certiorari was filed March 5, 1954. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1). See also Rules 37(b)(2) and 45(a), Federal Rules of Criminal Procedure.

QUESTIONS PRESENTED

1. Whether the evidence supporting the Government's net worth computation, the sufficiency of which was not challenged in the trial court, was sufficient to prove wilful attempted evasion of income taxes.

2. Whether the trial court erred in permitting the jury to consider three financial statements prepared by the petitioner in 1949 and 1950 in which some of the assets were valued at the market instead of at cost.

3. Whether the trial court erred in permitting the Government to introduce evidence of income taxes paid by petitioner in previous years in order to reconstruct his net worth at the starting point of the computation.

4. Whether such grave errors were committed in the prosecutor's argument and in the trial judge's charge as to require the Court of Appeals to exercise its discretion to notice plain error in the absence of a trial objection.

STATUTE AND RULES INVOLVED

INTERNAL REVENUE CODE:

SEC. 145. PENALTIES.

(b) *Failure to collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.*—Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

* * * *

(26 U.S.C. 1946 ed., Sec. 145.)

FEDERAL RULES OF CRIMINAL PROCEDURE:

RULE 30. INSTRUCTIONS

At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to

adverse parties. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury.

RULE 52. HARMLESS ERROR AND PLAIN ERROR

(a) Harmless Error. Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.

(b) Plain Error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

STATEMENT

On May 8, 1952, a six-count indictment was filed against petitioner in the United States District Court for the Western District of Missouri charging him with wilful attempts to evade and defeat his income taxes for the years 1945 through 1950 by filing fraudulent returns, in violation of Section 145(b) of the Internal Revenue Code. (R. 1-4.)

The amounts of net income and the taxes due thereon, as reported in the returns and as corrected, were alleged to be as follows:

	Reported		*Corrected*	
	Income	*Tax*	*Income*	*Tax*
Count I (1945)	$18,297.52	$ 5,882.69	$77,221.17	$48,650.70
Count II (1946)	44,836.04	20,612.03	57,240.11	29,212.58
Count III (1947)	22,716.92	7,810.41	69,186.82	38,670.42
Count IV (1948)	43,615.47	13,927.94	67,039.89	26,462.02
Count V (1949)	44,139.16	14,186.00	61,412.51	23,218.77
Count VI (1950)	42,954.37	14,075.24	68,358.14	28,153.24

After a jury trial lasting seven days petitioner was found guilty on the first four counts and not guilty on the last two. (R. 79-80, 85-86.) On September 23, 1952, concurrent sentences of imprisonment for four years were imposed under each of the first three counts, and petitioner was fined $10,000 on the first count and $5,000 on both the second and third counts, a total of four years' imprisonment and $20,000 in fines. Imposition of sentence was suspended as to the fourth count and petitioner was placed on probation for five years, beginning with his release from prison and conditioned on settlement or compromise of his tax liabilities. (R. 80-82.) The Court of Appeals affirmed. (R. 122-130.)

The evidence to support the verdict may be summarized as follows:

During the years involved in this case, petitioner owned or acquired interests in a number of taverns and bars. (R. 9, 97-99.) Some of these he leased

to operators under agreements whereby he was to receive either 10% or 20% of the gross receipts plus $50 a week rental. (R. 16-21, 105-108.) Each Saturday night petitioner and his wife visited the various locations, opened the cash register and read the total receipts for the week, subtracted the expenses (which had been paid out of the register by the operator), divided the profit with the operator, and reset the register for the following week. Petitioner's wife would record the total receipts and expenses in a day book kept at the location. (R. 41-47, 111-113.)

Petitioner also owned or acquired large interests in real estate (R. 9, 15, 99-102), equities in several oil wells, and a small amount of stocks and bonds (R. 9). He reported gambling winnings for one year. (R. 102-103.)

During the investigation of petitioner's returns for the years involved, Internal Revenue Agents had numerous conversations with him concerning his income and his assets. (R. 102-103; Tr. 96, 102, 109, 117, 120, 123, 127, 150, 153, 158, 162, 175, 229, 412, 416-417, 474-478, 487, 498-499.) They talked to over a hundred persons with whom petitioner had had business dealings. (Tr. 46-50.) They discovered that he had purchased over a thousand cashier's checks in amounts varying from $10 to $40,000. (Tr. 58-59.) And they were unable to trace the source of large amounts of cash which he had used to pay for various real estate acquisi-

tions. (Tr. 161-187.) For instance, of $45,000 used to purchase the Rasbach Hotel in 1945, the agents were unable to trace the source of $27,000 (Tr. 161-164), and they were unable to trace any of approximately $18,500 used to purchase another property in 1947 (Tr. 176-178).

In view of the fact that petitioner had virtually no records for 1945, 1946 and 1947, very few records for 1948, and incomplete records for 1949 and 1950, the Government presented proof of his correct net taxable income for all these years by computing the annual increases in his net worth and adding thereto his proven non-deductible annual expenditures. (R. 8-9, 55.) There was no dispute as to petitioner's net worth at the starting point, December 31, 1944. Counsel stipulated that it was $146,924.41 (R. 9-14.) Nor was there any dispute as to the ownership or valuation of the items included in the Government's computation. All items included therein were valued, not at market value, but at the original cost to petitioner. (R. 11.) In fact, the Government did not use the inflated values which petitioner had ascribed to some of these properties in his returns.[2] The Government included only those expenditures which could be verified, and the net worth computation, therefore, shows a smaller increase in assets than it would

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[2] He appears to have used market value in his returns, thus permitting him to claim considerably larger depreciation deductions. (Tr. 95-98, 111-112, 476, 741-742.)

have had petitioner's own figures been used. (R. 97-99; Tr. 111-112.) The computation revealed the following as to petitioner's net income (R. 9):

Year	*Reported*	*Corrected*	*Unreported*
1945	$18,297.52	$59,937.67	$41,640.15
1946	44,836.04	64,343.44	19,507.40
1947	22,716.92	64,716.40	41,999.48
1948	43,615.47	65,778.37	22,162.90
1949	44,139.16	61,132.73	16,993.57
1950	42,954.37	68,817.05	25,862.68

During the year 1945 petitioner sold none of the assets which he admittedly had at the starting point date, his cash on hand increased over $30,000, and he spent over $50,000 in acquiring two properties. Yet he reported taxable income of only $18,297.52. During the year 1947 petitioner spent approximately $68,000 in the acquisition of two new properties and reported taxable income of only $22,716.92. The difference cannot be accounted for by sale of other properties or use of cash on hand. (R. 9; Tr. 214-215.)

In addition to the net worth computation the Government proved substantial specific items of taxable income which had been received by petitioner but not reported in his returns. The $50 weekly rent received from the tavern operators had not been reported, and rentals received from certain other properties had also been omitted. (R. 22-25, 103, 108-109.) A large part of the Government's case was devoted to these specific items (Tr. 218-390), and the prosecutor opened his argument

to the jury by recapitulating this evidence (Tr. 729-737). The totals of the unreported items for the years still involved in the case are (R. 108-109):

1945	$14,859.96
1946	5,485.00
1947	9,217.52
1948	3,484.00

The Revenue Agent who had conducted the investigation stated that he did not know the source of the additional income shown by the net worth computation over and above these specific items. (R. 26-27.)

Petitioner did not take the stand himself. The defense sought to counter the Government's specific items of proof by denying receipt of some of these items and explaining the failure to report others. The defense also sought to explain the additional unreported income shown by the Government's net worth computation as the unintended result of petitioner's inadequate bookkeeping system.

Petitioner's wife testified that she had accompanied him on his weekly rounds of the taverns, that she had never seen him receive the $50 rental from any of the operators, and that she had omitted certain other income from his returns through oversight. (R. 41-47, 111-113.) Receipt of one other specific item amounting to approximate-

ly $4,800 was also challenged. (R. 51, 105-106, 115-116.)

The essence of the defense was that the Government had failed to prove that petitioner had wilfully failed to report all of his taxable income, that his "homespun" bookkeeping system had been inadequate for his greatly increased assets, and that the large omissions shown by the Government's net worth computation could be accounted for by the errors of his bookkeepers and accountants. (Tr. 510, 514, 517.) Nelson, a certified public accountant, testified that he had analyzed petitioner's books for 1949 and 1950, during which two years the books were fairly complete. His analysis showed that petitioner had actually received taxable income closely approximating that shown by the Government's computation. Nelson testified that the failure to report this income was attributable to the errors of the bookkeepers. (R. 52-56.) The defense asked the jury to assume that similar errors accounted for the omissions in 1945, 1946, 1947 and 1948, for which years Nelson was unable to make an analysis because of lack of records. (R. 55; Tr. 517, 760-763.)

The sufficiency of the Government's case was not challenged by a motion for a judgment of acquittal, either at the close of the Government's case or at the close of all the evidence. (Tr. 508, 727.)

ARGUMENT

1. Petitioner contends (Pet. 2, 11-16) that the Government failed to prove unreported taxable income by its net worth computation because it failed to exclude the *possibility* that the increases could have come from gifts, loans or inheritances. He argues that, although he failed to raise this point in the trial court, there is an essential failure of proof constituting plain and substantial error which should have been noted by the Court of Appeals. And, despite the fact that the Government also relied on proof of substantial specific items of unreported income (the sufficiency of which is not challenged), he urges that the conviction should be reversed because the jury may have relied upon the Government's net worth proof.

There can be no doubt that the Court of Appeals may, in its discretion, notice the clear failure of the Government to prove an essential element of its case, even in the absence of proper objection in the trial court. But petitioner was hardly in a position to invoke the exercise of that discretion in this case. Although the defense was clearly aware of the significance of loans, gifts or inheritances (Tr. 407-410), there was no suggestion at any time during the trial that the unreported income was traceable to such non-taxable sources. Instead, the defense frankly admitted failures to report taxable income and sought to explain them

as bookkeeping errors. (See *supra*, pp. 9, 10, and Tr. 769-772.) After claiming innocent failure in the trial court, petitioner cannot turn around on appeal and claim that there was no failure at all.

Furthermore, even apart from these admissions by the defense, there was no deficiency in the Government's net worth proof. Concededly the burden rested upon the Government to establish that the increases came from current taxable income. In this case, it is true, the Government did not exclude the *possibility* that the increases had come from gifts, devises or loans. But it was not incumbent on the Government to exclude all speculative possibilities of innocence. In order to establish a *prima facie* case the Government had to present evidence which could convince a reasonable mind that the only reasonable *probability* was that a substantial portion of the increases was attributable to unreported taxable income.[8] The test on appeal of the sufficiency of the Government's evidence is whether reasonable minds, regarding that evidence in the light most favorable to the Government, could conclude beyond a reasonable doubt that petitioner had wilfully failed to report substantial portions of his taxable income. *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 254; *Glasser* v. *United States*, 315 U. S. 60, 80;

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[8] The Government was not, of course, required to prove the exact amount of unreported income. *United States* v. *Johnson*, 319 U. S. 503, 517.

Gorin v. *United States*, 312 U. S. 19, 32; *Pierce* v. *United States*, 252 U. S. 239, 251-252; *Stilson* v. *United States*, 250 U. S. 583, 588-589; *Curley* v. *United States*, 160 F. 2d 229, 232-233 (C.A.D.C.), certiorari denied, 331 U. S. 837; *Gendelman* v. United States, 191 F. 2d 993, 995 (C.A. 9th), certiorari denied, 342 U. S. 909; *Stoppelli* v. *United States*, 183 F. 2d 391 (C.A. 9th), certiorari denied, 340 U. S. 864. The cases upon which petitioner relies,[4] in which the jury had been permitted to draw an arbitrary inference from the facts proved, are not here in point.

Judged by the above test, the Government's net worth proof was sufficient to take the case to the jury. The computation showed unexplained increases in petitioner's net worth ranging from $17,000 to $42,000 for each of the six years involved in the investigation. But the Government's case did not rest, as petitioner asserts (Pet. 13), upon "mere proof of increase in assets." The Government proved definite sources of income, specific items of unreported income, and an intensive investigation which had revealed no gifts or other non-taxable receipts to account for the increases in petitioner's wealth. Information as to the existence of unknown or secret gifts was peculiarly within the knowledge and control of the petitioner and could easily have been presented by him. To

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[4] See *Tot* v. *United States*, 319 U. S. 463; *Morissette* v. *United States*, 342 U. S. 246.

prevail on this ground the defendant should be required at least to put in issue at the trial the receipt of specific gifts. In the circumstances of this case, where no such effort was even suggested at the trial, the jury could reasonably infer that the increases were not attributable to non-taxable sources. This Court has said (*Rossi* v. *United States*, 289 U. S. 89, 91-92):[5]

> The general principle * * * is that it is not incumbent on the prosecution to adduce positive evidence to support a negative averment the truth of which is fairly indicated by established circumstances and which if untrue could be readily disproved by the production of documents or other evidence probably within the defendant's possession or control.

Certainly, if a jury may weigh the failure of an accused murderer to explain recent possession of property of the deceased,[6] if it may draw an inference of guilt from the unexplained possession of contraband narcotics,[7] it may also give weight to the failure of an accused taxpayer to produce evidence of non-taxable sources of income in explanation of large increases in his net worth discovered

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[5] See also *United States* v. *Fleischman*, 339 U. S. 349, 360-364; *Morrison* v. *California*, 291 U. S. 82, 88-91; *Casey* v. *United States*, 276 U. S. 413, 418.

[6] *Wilson* v. *United States*, 162 U. S. 613, 619.

[7] *Yee Hem* v. *United States*, 268 U. S. 178, 185; *Dear Check Quong* v. *United States*, 160 F. 2d 251, 252-253 (C.A.D.C.).

[8] *Bell* v. *United States*, 185 F. 2d 302, 309 (C.A. 4th), certiorari denied, 340 U. S. 930; *Schuermann* v. *United States*, 174 F. 2d 397, 399 (C.A. 8th), certiorari denied, 338 U. S. 831.

by the investigating agents.[8] The force of a *prima facie* case may not be defeated by "skilful concealment" (*United States* v. *Johnson*, 319 U. S. 503, 517-518), or by mere conjecture and speculation as to the possible existence of non-taxable sources (*Banks* v. *United States*, 204 F. 2d 666, 672, (C.A. 8th), certiorari denied, 346 U. S. 857). Here, where the probative force of the Government's evidence has the support of both courts below and of the jury, there is no occasion for further review by this Court. *United States* v. *Johnson*, *supra*, p. 518.

There is no conflict on this point with the two cases on which petitioner so heavily relies (Pet. 12-14), *Bryan* v. *United States*, 175 F. 2d 223 (C.A. 5th),[8] and *United States* v. *Fenwick*, 177 F. 2d 488 (C.A. 7th). In each of these cases there was an incomplete investigation and the Government was forced to admit that there might well be assets which it had not discovered. See 175 F. 2d at 226, and 177 F. 2d at 491. But here there was no comparable defect; the jury could properly infer, as it did, that the large increases in net worth uncovered by the agents, which petitioner at no time claimed were derived from non-taxable sources, actually represented current income.

2/ Petitioner contends (Pet. 2-3, 11, 16-19) that it was prejudicial error to permit the jury to consider the three financial statements which he pre-

[8] Affirmed on another ground, 338 U. S. 552.

pared in 1949 and 1950, for the reason that the assets therein were valued, not at cost, but at the market. The argument is without merit.

The three statements were submitted at the very end of the Government's case in corroboration of the completed net worth computation, and it was made clear that market values were used in them. (R. 29-41.) On the other hand, it was repeatedly impressed upon the jury, both by the prosecution and by the defense, that the Government's net worth computation, in order to present a true picture of petitioner's income, must necessarily value his assets at cost. (R. 11-15, 97-102; Tr. 78, 85-86, 101, 105, 115, 119, 122, 126, 129, 169, 402-403, 415-416, 740, 774-775.) The absence of any prejudice is demonstrated by the fact that petitioner was acquitted on the counts covering the years 1949 and 1950 in which the financial statements were prepared. The net worth computation, the results of which petitioner did not challenge but only sought to explain at the trial, provided ample evidence of unreported income exclusive of the financial statements, and it bore out the judge's remark to the jury that the evidence indicated petitioner had a net income of approximately $60,000 a year. (Cf. R. 9 and 71-72.) The calculation upon which petitioner now relies (Pet. 18) is fallacious in that it fails to take into consideration non-deductible expenditures of from $11,000 to $29,000 a year

which the Government properly included in the net worth computation. (Cf. R. 9 and 133.)

3. Equally without substance is the argument (Pet. 3, 11, 19-21) that the trial court erred in admitting a record of the taxes paid by petitioner in the years prior to 1945.

Evidence which incidentally establishes the commission of another wrongful act is admissible if relevant to establish the offense charged. *Wolcher v. United States*, 200 F. 2d 493, 497 (C.A. 9th). Since this was a net worth case the amount of income earned and taxes paid by petitioner in the years prior to the years involved in the indictment was obviously relevant to the establishment of his net worth at the starting point,[10] and the exhibit in question was introduced by the Government for that purpose because defense counsel would not concede the beginning figure. (R. 6-7.) A little later, however, the defense abandoned this position and did concede that the starting point net worth was $146,924.41. (R. 11-14.) The purpose for which the exhibit was originally admitted was clearly understood by defense counsel. (Cf. R. 25 and Tr. 391-393.) Since there was no issue before the jury as to the starting point, no instruction was either requested or given on the use to be made of the tax payment exhibit.

[10] The Government's witness was not talking about the starting point (see Pet. 8, 21) when he said that prior tax payments had no bearing on the net worth computation. (Tr. 391-393.)

Petitioner contends (Pet. 3-4, 11, 27-29) that several errors were committed in the prosecutor's closing argument to the jury and in the court's charge. Error in the argument is alleged (1) in the prosecutor's statement that the court allowed him to cross-examine two Government witnesses on the ground that they were not telling the truth; (2) in the statements that no witness denied petitioner's receipt of the $50 payments, and that petitioner was hiding behind the skirts of his wife; and (3) in the statement that petitioner could not escape by putting the blame on his bookkeepers. Error in the court's charge is alleged (1) in the statement that the testimony of petitioner's wife that she had never seen him receive the $50 payments was negative and weak testimony as compared with positive testimony to the contrary; and (2) in refusal to give a requested instruction that there is a legal difference between a taxpayer who makes out his own return and one whose return is made out by another. We submit that each of these isolated passages, with the possible but harmless exception of the court's comment on the weakness of Mrs. Mitchell's testimony, is proper in its context.

In the first place no objection was raised in the trial court to any portion of the prosecutor's argument. Nor was the attention of the trial judge directed to either of the objections now made to the charge. When the judge had finished the

charge, defense counsel requested and was granted one addition, immaterial here. Thereafter defense counsel said, "Your Honor, we have nothing else. That is the only point. No exceptions." (R. 77-78.) Only a very grave error could, therefore, be noted by the Court of Appeals. *Brotherhood of Carpenters* v. *United States*, 330 U. S. 395, 408-412.

The passages complained of in the prosecutor's closing argument were all intended to answer arguments which had just been made by the defense. Defense counsel had called the jury's attention to the contradictory testimony of the two McIntoshes, both Government witnesses, as to the $50 payments (Tr. 749-750, 767-768); he had to a certain extent misrepresented the testimony of petitioner's wife on the same subject (Tr. 751-752); and he had relied heavily on testimony as to mistakes by petitioner's bookkeepers and accountants (Tr. 763-766, 775-777). The prosecutor's argument in reply, considered as a whole (R. 57-65), was not unfair. See *United States* v. *Socony-Vacuum Oil Co.*, *supra*, pp. 237-243.

Petitioner's complaints concerning the trial court's instructions are equally unworthy of further review. While it would probably have been better if the court had refrained from commenting on the quality of Mrs. Mitchell's testimony (see II Wigmore, *Evidence* (3d ed. 1940), Sec. 664), in the absence of objection at the trial this cannot have been such grave error as to require reversal.

This is particularly true in view of the obviously interested character of Mrs. Mitchell's testimony (Tr. 580-594) and in view of the court's express instruction to the jury, at the outset of the charge and immediately after the questioned passage, that they should disregard any expressions of opinion from him and make up their own minds on the facts (R. 65-67, 73). Finally, petitioner's refused instruction (R. 65) was incorrect in postulating a "legal difference" between a taxpayer who has someone else make out his returns and one who makes out his own. The jury were plainly told that petitioner could not be held criminally responsible for inaccuracies in his returns, but must be found to have wilfully filed false returns. (R. 70, 72.)[11]

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[11] Petitioner also urges (Pet. 3, 11, 21-26) that the Court of Appeals has erroneously interpreted Rule 52, *supra*, p. 4, the "harmless error" and "plain error" rule. But the opinion of the court below clearly shows a proper understanding of "plain error" (R. 128-129), and there was no occasion for invocation of "harmless error" since, as has been shown, the rulings to which a proper objection was made in the trial court were not erroneous.

CONCLUSION

The decision of the Court of Appeals is correct, and no question warranting review is presented. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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